PETITION FOR REHEARING.

On April 2, 1962, this Court announced its Decision, two Justices dissenting,[1] and reversed the Judgment of the Court of Appeals for the Third Circuit. This Decision, in turn, had reversed a Judgment of the United States District Court for the Eastern District of Pennsylvania which had been entered upon the verdict of the jury. The Court of Appeals remanded the case with directions.

While the Court of Appeals had reversed the Judgment of the District Court as a matter of law, it had made other points, finding other error in the Charge which, if its reversal and direction was wrong [as this Court has now held] nevertheless entitled this Respondent to a new trial.

This Petition for rehearing will address itself to two questions.

A. The Judgment of this Court reversing the Court of Appeals should be modified to provide for a new trial as between Petitioner and Respondent.

B. Certain language in the last paragraph of the Court's Opinion which apparently extends a shipowner's warranty of seaworthiness to the packaging around cargo which it carries as a common carrier should be modified. The issue of unseaworthiness was not before this Court in this case and if there is to be such an extension of the "awesome"[2] responsibility for unseaworthiness, it is respectfully suggested that it should only be done after full consideration and in a

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1. Justices Stewart and Frankfurter—Mr. Justice Whittaker had retired March 30, 1962. Mr. Justice White had not yet been appointed.

2. *Kent v. Shell Oil Co.*, 286 F. 2d 746, 752 (C. A. 5, 1961); *Waterman Steamship Corp. v. Gutierrez*, — F. 2d — (C. A. 1, April 11, 1962), not yet reported.

case where that is the issue and the pros and cons have been submitted for decision.

A. Accepting for the purposes of this Petition all that the Court's Opinion of April 2, 1962 considered and held, we respectfully suggest that the Judgment of this Court should not be a mere reversal. Reversal should be with directions that a new trial be had between Respondent and Petitioner.

We say this because the Court of Appeals considered more points than the Opinion of this Court has discussed. The Court of Appeals, perhaps considering the possibility of reversal, held squarely and specifically (289 F. 2d at 208) that the following instruction by the Trial Judge to the jury was error and that exceptions to it had been taken.

> "If you find that Atlantic & Gulf Stevedores, Mr. Marshall's client, was unloading the bales in a proper and safe manner, *using a method that was in accordance with the practice, customs, and usage in the Port of Philadelphia,* and that that was not in violation of their breach of contract which obtained between them, *then your verdict must be in favor of the Atlantic & Gulf Stevedores.*" (Emphasis supplied by the Court of Appeals.)

If the Court of Appeals was correct and that portion of the Charge to the jury was wrong, then a new trial is required and this Court's mandate should so direct.

It should be noted that in the above quoted language from the Charge [R. 185a-186a] the mandatory "must" was used. As this Court points out in Footnote 4 to its Decision in this case (Slip Opinion pages 8 and 9) dealing with another request, this time by the shipowner, this was a direction to the jury that if it found Petitioner's work method was in accordance with the custom and usage, it was not liable as a *matter of law.* Such a direction to the jury withdrew from jury consideration the question of whether

the stevedore performed its contract obligation "with reasonable safety" and rendered "workmanlike service."[3]

This Court cannot speculate that the jury ignored this erroneous instruction by the trial judge, for when more than one theory is submitted to the jury, on either of which they might have based decision and one of the instructions was erroneous, the verdict cannot be upheld.

> "If therefore, upon any one issue error was committed, either in the admission of evidence or in the charge of the court, the verdict cannot be upheld, for it may be that by that evidence the jury were controlled under the instructions given." *State of Maryland v. Baldwin*, 112 U. S. 490.

This is fundamental law which has been universally followed.

"Practice, custom and usage" are admissible in evidence but they do not form the standard upon which a jury must base its finding. If the petitioner's work method did not measure up to the jury's standard of "reasonable safety" and "workmanlike service", it should have been left free to so determine for "what usually is done may be evidence of what ought to be done, but what ought to be done is fixed by a standard of reasonable prudence".[4]

> "The tanker industry cannot hoist itself by its own bootstraps through the device of setting up standards of conduct amounting to something less than reasonable care under all the circumstances and then predicate defense on such sub-standards". *Petition of Oscar Tiedemann Co.*, 179 F. Supp. 227 at 238, 239.

> "What has been done by others previously, however uniform in mode it may be shown to have been, does

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3. *Waterman Steamship Corp. v. Dugan & McNamara*, 364 U. S. 421; *Crumady v. The Joachim Hendrik Fisser*, 358 U. S. 423.

4. Holmes, J. in *Texas and P. Ry. Co. v. Behymer*, 189 U. S. 468.

not make a rule of conduct by which the jury are to be limited and governed . . ." *State, to use v. Clark*, 41 Del. 246, 20 A. 2d 127, 130.

The Court of Appeals in its Opinion in this case had discussed the "custom" question at some length earlier in its Opinion, 289 F. 2d at 205-206, and concluded that the jury should have been left free to find whether the "customary method" did or did not satisfy the standard of reasonable care.

If the shipowner's right to indemnity was not a matter of law, then by the same standard neither was the stevedore's work method and if one was properly for jury determination then, we submit, so was the other. A new trial with proper jury instruction is required.

B. The last paragraph of this Court's Opinion begins with the following sentence:

> "So far as we know the jury may have found respondents liable not on either of those two grounds but solely on a third, namely because of defective bands—a matter which was covered by the charge to the jury on the issue of unseaworthiness, and properly so. Weyerhaeuser S. S. Co. v. Nacirema Co., 355 U. S. 563, 567."

This Court's decision in *Weyerhaeuser S. S. Co. v. Nacirema Co.* did not deal with the question of whether the shipowner, in addition to warranting seaworthiness of its vessel and its appliances, and the appliances which the stevedore brings on board for use in the loading or discharging operation,[5] also warrants that the cargo which the common carrier has transported by water shall be "cargo safe to handle".[6]

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5. *Alaska S. S. Corp. v. Petterson*, 347 U. S. 396.

6. *Carabelleas v. Navieras Asmar S. A.*, 285 F. 2d 355 (C. A. 2, 1960), cert. denied, 365 U. S. 872.

In view of the jury's answers to interrogatories, finding respondent liable for *both unseaworthiness and negligence,* it is difficult to see how this Court, interpreting the jury finding, can make any statement inferring that unseaworthiness could have been the *sole* ground for the jury's determination. To do so is for this Court to do precisely what it held improper when done by the Court of Appeals.

The Court of Appeals said that it was

> "Unnecessary for us to consider the issue of seaworthiness which was premised on Beard's view that the doctrine of unseaworthiness extends to the packaging of the ship's cargo." 289 F. 2d at 208.

Consequently that issue was not briefed or argued here by the parties. If this Court's language means what it seems to say, it has extended liability without fault into an entirely new and greatly broadened sphere without reference to, and indeed in contravention of, the policies which apparently motivated this Court in promulgating liability for unseaworthiness in the first place. *Seas Shipping Co. v. Sieracki,* 328 U. S. 85.[7]

At least three Courts of Appeal have refused to extend the carrier's warranty to the cargo it transports.

> "But we know of no case that imposed absolute liability on the owner where the alleged danger was inherent in the cargo and this was still in the course of being loaded. Hence the question posed is whether the owner warrants to longshoremen not simply a safe place in which to handle cargo, but cargo which is safe to handle. We are not disposed so to extend the doctrine, at least on the facts here. Almost any cargo presents

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7. The stevedore "ordinarily has neither right nor opportunity to discover or remove the cause of the peril and it is doubtful, therefore, that he owes to his employees, with respect to these hazards, the employer's ordinary duty to furnish a safe place to work, unless perhaps in cases where the perils are obvious or his own action creates them". *Seas Shipping Co. v. Sieracki,* 328 U. S. 85 at 95.

some hazard in handling." *Carabellese v. Naviera Azsor S. A.*, 285 F. 2d 355, 359, 360 (C. A. 2, 1960) cert. denied, 365 U. S. 872.

The Court of Appeals for the Third Circuit apparently concurs with the Second Circuit's Decision in *Carabellese*. See Footnote 9 to its Opinion in this case, 289 F. 2d 208 [R. 229, 230].

When liability for unseaworthiness of cargo was asserted as the ground to support recovery, the Court of Appeals for the First Circuit declined to approve and said:

"But it seems to us that to extend such protection disregards the whole origin and purpose of the doctrine of unseaworthiness" and by Footnote at that point commented:

"Singularly enough, the doctrine of absolute tort liability for injuries ashore, to the extent that there have been cases, seems to exist solely for the benefit of longshoremen. Whether these decisions represent the independent views of the courts concerned, or are merely thought to be required by those of the Supreme Court, may be problematical. Cf. Robillard v. A. L. Burbank & Co., 186 F. Supp. 196. But we know that on at least one occasion we ourselves have erroneously exaggerated those views. New N. H. & H. R. R. v. Monagan, 1 Cir., 1959; 272 F. 2d 153, rev'd, 1960, 364 U. S. 441."

Waterman Steamship Corp. v. Gutierrez, — F. 2d —; (C. A. 1, April 11, 1962, Slip Opinion, page 4).

As the Court of Appeals for the Fifth Circuit has said:

"Unseaworthiness to be sure sets in train awesome obligations which distinguish it from negligence." *Kent v. Shell Oil*, 286 F. 2d 746 at 752 (C. A. 5, 1961).

Where this question was presented to this Court, it denied certiorari, *Beard v. Ellerman Lines, Ltd.*, No. 284, this

term. It is respectfully suggested that judicial restraint should preclude this Court from extending the field of absolute liability by indirection in a case where the issue is not before it. This is particularly so where, as here, the cargo has been the subject of common carriage.[8]

Extension of absolute liability based upon unseaworthiness should not, we suggest, be determined without at least a full scale presentation of the issues and consequences.

Recently the Federal Maritime Board held that explosives were the subject matter of common carriage.[9] Such holdings by the body charged with the function of regulating ocean shipping are in basic conflict with the concepts of "warranty of cargo safe to handle". If fitness for its intended purpose is the test, does such a carrier warrant that dynamite will or will not explode?

It is respectfully urged that this Honorable Court shall modify the language in the last paragraph of its Opinion in this case and withhold determination of a question of far-reaching importance until that case is actually presented for determination. It is respectfully suggested that, in addition to other questions which will then require decision, this Court may then have to consider whether Constitutional issues may not be raised by judicial decisions which require a carrier to "warrant" while, at the same time, the regulatory agency and Congressional enactment require him to carry. Whether such amount to unconstitutional deprivation of property and unequal protection as between water

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8. A common carrier "is, in general, bound to take the goods of all who offer, unless his complement for the trip is full . . ." *The Niagara v. Cordes*, 62 U. S. 7.

"To constitute common carriage the carrier must be under such a legal obligation to carry that an action will lie against him for a refusal to perform . . ." Hutchinson on Carriers, 3rd Ed., Section 62.

9. Absorption or Equalization of Inland Freight Charges, F. M. B., Docket No. 819, decided December 16, 1960, not yet reported. But Cf. *Parrott v. Wells*, 15 Wall. 524; *California Powder Works v. Atlantic & Pacific R. Co.*, 113 Cal. 329; and cases there cited.

and other carriers are questions which, we submit, require more than offhand treatment.

Wherefore, it is respectfully submitted that this Honorable Court shall modify its Judgment to require a new trial of the issues between Respondent and Petitioner under proper instructions so that both sides shall have jury determination, and that reference to liability for unseaworthiness of cargo required to be carried shall await decision until that issue is fully and clearly presented.

Respectfully submitted,

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CERTIFICATE.

I hereby certify that the within petition for rehearing is filed in good faith and not for the purpose of delay.

THOMAS E. BYRNE, JR.